The Politics of “The Least Dangerous Branch”: The Court, the Constitution, and Constitutional Politics Since 1945

MARY L. DUDZIAK

The courts, wrote Alexander Hamilton, are “the least dangerous branch” of government, “having neither FORCE, nor WILL, but only judgment.” In this idealized depiction, judges stand beyond politics. They discern true principles of law and of justice, and apply them in the cases they confront. Their isolation from politics helps confer upon courts a sense of the legitimacy of their judgments. And that legitimacy is a source of the court’s power. This vision of the judiciary may have continued on in American high school civics books by the mid-twentieth century; however, the courts themselves would not have the luxury of blind faith on the part of the American public in their judgments.

American courts have never been far from the political fray, but in the twentieth century, as highly charged cases found their way before the US Supreme Court, constitutional questions – including the proper role of the courts themselves – more frequently occupied American politics. From the scope of federal regulatory power, to the legality of racial segregation, to the “right to life,” crucial political issues came before the United States Supreme Court, and the Court, in turn, became a political issue.

As the courts took up many of the most important political and social questions, it is not surprising that scholarship on the courts and on constitutional history was highly charged. All scholarship has consequences, but the consequences of legal scholarship are particularly visible and immediate. Scholarship on the intentions of the framers of the equal protection clause, or on the history of the legal status of abortion, would find its way into briefs before the US Supreme Court, and then would be cited by justices in support of a Court ruling. The line between scholarship and advocacy, always tenuous, is more questionable than ever here. It is not just that some legal scholars who write about the history and theory of the Constitution also write briefs advocating that the “correct” vision of history dictates a particular outcome in a case. Professional historians have served as consultants in cases, briefs by historians have increasingly been filed in high-profile cases, and as if to complete the circle, some judges have themselves written constitutional history, advocating a vision of history that also certainly informs their approach to deciding cases. And at no time were the role of the courts and the nature of constitutional history more
heatedly debated than at the end of the twentieth century, when the Supreme Court decided perhaps its most political case of all, ending the 2000 presidential election and handing the presidency to George W. Bush.

Scholarship on the courts often focuses on particular iconic moments, like the 2000 election, and sometimes focuses on Chief Justices who become iconic figures. Prior to the 2000 election case, there were three events that would most affect post-1945 thinking about the courts: first, the 1937 “switch in time that saved nine,” when the Supreme Court appeared to abruptly shift course to uphold New Deal programs and state labor regulation; second, the 1954 decision in Brown v. Board of Education invalidating racial segregation in public schools; and third, the 1973 ruling protecting abortion rights, Roe v. Wade. The Supreme Court Chief Justice whose tenure on the Court has evoked most scholarly commentary is Chief Justice Earl Warren, who served from 1953 to 1969.

The “Switch in Time” and Constitutional Theory

American legal history in the late 1930s is a subject of great debate. For many years the standard account, as developed especially by New Deal scholars like William E. Leuchtenburg, has held that the Supreme Court dramatically altered course in 1937. During the preceding years, called the “Lochner era” after a 1905 case in which the Court struck down a state law regulating hours and working conditions of bakers, the Court had played a judicially activist but politically conservative role. Many of President Franklin Delano Roosevelt’s New Deal programs had been struck down because they had gone beyond what the Court thought were appropriate limits on Congress’s power. The Court also had carefully scrutinized state labor regulations, invalidating those that interfered with the rights of workers and employers to freely bargain over labor conditions. In early 1937, FDR proposed a plan to pack the Court. In the midst of the political controversy over the Court’s role, the Supreme Court itself appeared suddenly to change course. It seemed to many that the Court was responding to political pressure, although later archival research would show that the crucial “switch in time” vote occurred before Roosevelt’s court-packing plan was announced (Leonard, 1971; Leuchtenburg, 1996).

Through the rest of the twentieth century, the Lochner era would continue to haunt constitutional history. Seen as a period of judicial excess, the lesson of the Lochner era would appear to be that judges should be deferential to the political branches, that less judicial involvement in scrutinizing federal and state statutes would keep the Court more properly confined to its legitimate role. Judges and scholars advocating a strong role for the courts, for example in protecting individual rights, faced the challenge of distinguishing new forms of judicial activism from the judicial missteps of the Lochner era.

How the Court’s actions in the 1930s were understood would come to have a profound impact on scholars’ views about the basic nature of constitutional analysis in later years. Bruce Ackerman argued that FDR’s landslide victory in the 1936 presidential election was a ratification of a new constitutional vision embodied in FDR’s New Deal. The Court fell in line with this new constitutional vision when it changed course in 1937. Although the formal process of constitutional amendment had not been used, the Constitution had nevertheless been transformed during this “consti-
tutional moment,” Ackerman argued. The consequences were significant. For Ackerman, later judges were bound to interpret the scope of government regulatory power in light of the constitutional transformation of the 1930s. The result was that a stronger role for Congress in regulating labor and other areas of American life was legitimate. Ackerman provided a theory that justified the path the Court had, in fact, taken from 1937 to the 1990s (Ackerman, 1991, 1998).

Political scientists and legal historians challenged Ackerman’s theory, and put into question the long-accepted historical narrative about the Court during the New Deal. Barry Cushman argued that there was no clean break in 1937 and that the Court’s decisions in the late 1930s were based on case-law that had been developing in earlier years. The 1937 cases were best seen as an outgrowth of earlier developments in legal doctrine. If, as Cushman argued, there was no dramatic turnabout in 1937, then there could have been no “constitutional moment” and no public ratification of a constitutional transformation. If the Constitution had not been transformed, then legitimate questions could be raised about whether congressional enactments throughout the rest of the century had transgressed constitutional limits on Congress’s power (Cushman, 1998).

The ensuing scholarly debate ultimately turned on what were thought of as “internalist” and “externalist” views of legal history. Externalists, including Laura Kalman, viewed legal history as being driven by forces outside of the law itself. In the New Deal period, an important external influence was American politics, popular criticism of the Court, and support for FDR’s efforts to pull the nation out of depression. Internalists like Cushman and G. Edward White argued that external accounts had given short shrift to the role of legal analysis. Judges were constrained by case-law, they argued, and legal doctrine itself played a critical role in the way American legal history unfolded (Symposium, *Yale Law Journal*, 1999; White, 2000).

Much of the debate about the 1930s has operated within the frame of the New Deal period. A full “external” account of the courts, however, would require more. As David Bixby (1981) has shown, the Court and American political culture in the 1930s came to confront the specter of totalitarianism in other parts of the world. Many Americans, Bixby argues, believed that the judiciary served as a brake on the excesses of democracy, and that the courts were a necessary constraint on majoritarian politics. And indeed, once the Court changed course in 1937 and adopted a posture of deference toward economic legislation, the Court also crafted a new approach to individual rights. The Court would more closely scrutinize legislation that harmed minorities, since some groups, especially racial and religious minorities, were not fairly treated in a majoritarian system of government (Cover, 1982). Richard Primus (1999) also shows how anti-totalitarianism infused US rights discourse during this period. There were limits to the Court’s new solicitude for minority rights, however, as illustrated most dramatically when the Court upheld aspects of the program to remove persons of Japanese heritage from their homes on the West Coast, and send them to internment camps. Peter Irons shows that the evidence the Court relied on was tainted by race-based assumptions, yet ironically in the internment cases the Court reaffirmed its commitment to strict scrutiny of race-based government action (Irons, 1993).

By 1945, the Court was well on its way toward charting a new approach to the practice of judicial review. Whether the product of an abrupt shift or of incremental
change, a new jurisprudence had been framed in a time of crisis. The directions this new jurisprudence would take in later years was affected by the new constitutional challenges of the Cold War years.

The Cold War Constitution

Constitutional historians have long debated whether the Constitution serves as a meaningful restraint on government during times of crisis, or whether constitutional limits are malleable. While some suggest that it is unfortunate but inevitable that the Court will close ranks and support the executive branch during wartime, Chief Justice William Rehnquist has gone further, arguing in *All the Laws But One: Civil Liberties in Wartime* (1998) that the Court should be more deferential to the executive during such times. Yet if the Court simply falls in line behind the executive during times of crisis, of what value is a Constitution? The role of the Court and the Constitution during crisis times is most often discussed in the context of World Wars I and II, but is also at issue during early Cold War years. While cases on loyalty oaths and anti-subversive prosecutions went to the heart of the domestic Cold War, the Cold War context affected other cases as well. If communists might infiltrate American society through unseen “fifth column” activity, surely all aspects of American life were at risk and had broader implications for national security (see Shreck, 1998)?

*Dennis v. United States*, decided by the Court in 1951, dealt directly with the government efforts to prosecute members of the Communist Party. The eleven defendants in the case were charged with violating the Smith Act, which had made it unlawful to advocate or teach the overthrow of the government by force or violence, or to organize or help to organize a group of persons so teaching and advocating, or conspiring to do so. As Michael Belknap (1977) has shown, the evidence against the defendants revealed no overt actions to target government officials or disrupt government actions. Instead, the defendants had read writings by communists, including the *Communist Manifesto*. They had hoped for the day when workers would rise up and topple American capitalism, but they had taken no steps to bomb factories or to sabotage government operations. The Court believed that these hopes were enough. It is a government’s prerogative to defend itself, Chief Justice Fred Vinson argued, even against a small band of revolutionaries who had no chance of success. This low point in First Amendment jurisprudence provoked a strong dissent from Justice William O. Douglas. Under the First Amendment, speech should counter speech in the marketplace of ideas, he argued. Even revolutionaries should be able to speak openly unless their words truly pose an imminent “clear and present danger.”

Constitutional limits had more force in one of the most important cases of the early Cold War years, *Youngstown Sheet and Tube v. Sawyer* (1952), also known as the Steel Seizure Case. The classic work on this episode remains Maeva Marcus’s *Truman and the Steel Seizure Case: The Limits of Presidential Power* (1977). The United Steelworkers of America had called a strike against a number of steel companies that threatened to shut down the steel mills. For President Harry S. Truman, the implications of the threatened strike were global, for it threatened American military readiness during the Korean War. So the president issued an executive order directing the federal government to seize the steel mills and keep them operating. The steel companies went to court, arguing that Truman had exceeded his powers
as president by seizing private property. The Supreme Court agreed. Authority to act may have seemed necessary, but as Justice Douglas put it, necessity did not expand the president’s power under the Constitution. Unbridled executive authority might not have been abused by Harry Truman, but the Court was reluctant to establish a precedent that could be abused in the future. “It is absurd to see a dictator in a representative product of the Mississippi Valley. The accretion of dangerous power does not come in a day,” Douglas wrote. “It does come, however slowly, from the generative force of unchecked disregard of the restrictions that fence in even the most disinterested assertion of authority.”

At the same time that the Court was cracking down on communism, it was expanding rights in another area: racial equality. The Court’s desegregation cases are a crucial focal point of two important scholarly debates: first, about the nature of judicial review, and second, about the effectiveness of courts as an agent of social change.

The story of the desegregation cases is often framed as the “road to Brown,” since these cases laid the doctrinal groundwork for the Supreme Court’s landmark desegregation decision. The literature on this history is vast. Richard Kluger’s Simple Justice (1976) remains the classic narrative of the events leading to Brown, while James T. Patterson’s recent account carries the story through the post-Brown years. At first glance, the Supreme Court cases seem to tidily chip away at the doctrine of “separate but equal,” but Mark Tushnet’s careful (1987) study of the National Association for the Advancement of Colored People’s (NAACP’s) legal strategy shows that there was nothing inevitable about this story. In 1938, in Missouri ex rel. Gaines v. Canada, the Supreme Court did not question the constitutionality of racial segregation per se, but invalidated Missouri’s practice of sending black students out of state to go to law school since legal education was not offered to them in the state. It was the first time that the Court had looked seriously at the equality side of the separate-but-equal formula.

In Shelley v. Kramer (1946), the Court ruled racially restrictive covenants could not be enforced. These covenants typically forbade landowners from selling to persons of color, and they were used to foster residential segregation. In Shelley, the Court held that when private individuals invoked the support of state courts to enforce such agreements, that was “state action” in violation of the Fourteenth Amendment. Then in 1950, in Sweatt v. Painter and McLaurin v. Oklahoma, the Court found that legal education and graduate education could not be equal under the conditions of segregation. Sweatt and McLaurin significantly undermined Jim Crow in higher education. It was not clear at the time, however, whether the Court would extend these rulings to primary and secondary education, and whether the Court would find that government-sponsored segregation in all respects violated the Constitution.

Scholarly discussion of these cases often isolates them from their Cold War context. Yet as detailed in Mary L. Dudziak’s Cold War Civil Rights: Race and the Image of American Democracy (2000), connections with the Cold War permeate primary documents related to these cases and to other civil rights developments. The US Justice Department argued in each case leading up to and including Brown that racial segregation embarrassed the United States internationally at a time when it was argued that American democracy was a model for the world. From this perspective, the segregation cases can inform the broader story of the Court’s Cold War jurisprudence.
The Warren Court and the Countermajoritarian Difficulty

When the Supreme Court took up *Brown v. Board of Education*, the Warren Court era had begun. The Court under Chief Justice Earl Warren’s leadership has captured the imagination of scholars and has played a critical role in scholarly debates about judicial review and the effectiveness of courts as a vehicle for social change. Yet some Warren Court historians acknowledge the awkwardness of periodizing Court history by the tenure of a Chief Justice, even one of Warren’s reputation. Lucas A. Powe, Jr., in *The Warren Court and American Politics* (2000), for example, divides these years into three periods, with only the 1962–8 years seen as “History’s Warren Court.” While the Court had undermined the legal status of Jim Crow in the years before Warren’s appointment, most scholars believe that Warren played a critical role, if not in the outcome of *Brown* itself, then certainly in the unanimity of the Court’s verdict and in the nature of the ruling itself, which Warren authored (Hutchinson, 1979; Tushnet with Lezin, 1991).

*Brown* has been celebrated as one of the Supreme Court’s greatest moments, but the *Brown* opinion itself has been the target of much scholarly criticism. The Court’s ruling in *Brown* was, in many ways, a simple moral judgment: racial segregation was wrong. The difficulty for Chief Justice Warren in writing the opinion was the question of why it was the Court’s job to make that moral judgment and to enforce it on local school systems. In a footnote of the *Brown* opinion, Warren relied on social science evidence to support the finding that racial segregation was harmful to children. The evidence was useful not only because, at the time, it seemed powerful, but because reliance on modern scientific evidence also provided a means of arguing that the Court had learned something new about conditions of segregation, and that new knowledge required a different interpretation of the Fourteenth Amendment’s guarantee of equality, one that justified a departure from past rulings.

Many constitutional scholars have criticized the Court’s reliance on social science evidence, especially when some of the findings in *Brown*’s social science footnote 11 were criticized by social scientists themselves. If the Court had relied on dubious social science, then it could be argued that the very foundation for *Brown* was shaky (Powe, 2000). But if the legal and social science analysis in *Brown* was lacking, the opinion may still have been politically astute. By resting the decision on a new understanding of the facts, by arguing that modern science had only now shown us that segregation was harmful, the opinion was certainly less inflammatory than a ruling addressing the legacy of American racism would have been. Justice Warren did not point a finger of blame at southern whites, the individuals who would ultimately be charged with implementing the ruling. He also wrote *Brown* simply and plainly, so that all could read it, and many did as the opinion was reprinted in full in the nation’s newspapers. *Brown* was also broadcast to the world on the Voice of America, and used effectively in State Department efforts to placate foreign critics of American race discrimination.

What was missing from *Brown*? It is not just that *Brown* sidestepped the question of the “intent of the framers” of the equal protection clause, something the Court itself had asked southern states to file briefs on. Throughout the entire *Brown* opinion, no reference was made to racism or to the legacy of Jim Crow. It was an opinion sanitized of context. It would not be until 1967 in a case invalidating
Virginia’s ban on interracial marriage, a case appropriately titled *Loving v. Virginia*, that the Court finally directly addressed what all the civil rights cases in the 1940s, 1950s, and 1960s had been about. In *Loving*, the Court said that the purpose of the Virginia law had been to maintain white supremacy, thus setting the case in the context of the painful history of American racism. It was that context, and the recognition of continuing racial subordination, that was the reason the separate schools in *Brown* violated the Fourteenth Amendment. By failing to address this context in 1954, Warren undermined the legal basis for the Court’s important opinion.

While *Brown* served as a helpful reassurance that American democracy was on the side of racial equality, the case did not end up requiring the integration of southern school districts during the 1950s. In 1955 in *Brown v. Board of Education II*, the Court denied the plaintiffs in the desegregation cases a timely remedy, calling instead for “all deliberate speed” in the enforcement of *Brown*. As many legal scholars and social scientists have shown, it would not be until the middle of the 1960s, when Congress and the president also got behind strong civil rights enforcement, that the Court would reenter the fray and begin defining just what desegregation should look like (Hochschild, 1983; Rosenberg, 1991; Patterson, 2001).

A crisis over the role of the courts developed in the aftermath of *Brown*. Southern politicians stood in the schoolhouse door, claiming that their states’ rights had been violated and wrapping their resistance in the cloak of the Constitution. Southern members of Congress submitted a manifesto arguing that the Supreme Court had subverted the Constitution.

Criticism of *Brown* was not restricted to southern politicians and segregationists mobs. Throughout the academy, the *Brown* decision was heavily criticized as lacking a basis in law, precedent, or history, criticisms that would plague the Warren Court in other areas as well. Some scholars supported the outcome in *Brown*, but were uncomfortable with the way the Court got there. In an influential 1959 article, “Toward Neutral Principles of Constitutional Law,” Herbert Weschler suggested that *Brown* was more politics than law because it was not based on neutral, generalizable principles. Instead, Weschler argued, an alternative basis for *Brown* was freedom of association.

While such scholars as Charles Black (1960) responded to Weschler by defending *Brown* as appropriately applying principles of equality to victims of discrimination, other scholars expanded the critique of *Brown* to an attack on judicial activism in general. In 1962, Yale law professor Alexander Bickel, a former law clerk and protégé of Supreme Court Justice Felix Frankfurter, published a book that would become the bible of advocates of judicial restraint: *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*. Bickel’s title was borrowed from Alexander Hamilton, who had written in the *Federalist Papers* that the judiciary was the least dangerous of the branches of government. This branch, Bickel wrote, had become “the most extraordinarily powerful court of law the world has ever known.” Yet the courts played a problematic role in our political system. A democracy is based on majority rule, yet each time a court strikes down a statute, it acts counter to the will of the majority. Because of this “countermajoritarian difficulty,” Bickel argued that the courts should not play an activist role in striking down unwise popular enactments. He shared Frankfurter’s fondness for what he called the “passive virtues” — the exercise of court power in a restrained way so as to conserve the court’s authority (Bickel,
Bickel’s analysis of the countermajoritarian difficulty set the terms of debate over the role of the courts for the remainder of the twentieth century. Conservative scholars found in Bickel a justification for narrow theories of judicial power and constitutional interpretation. Liberals such as John Hart Ely took Bickel as their starting point and crafted a theory of judicial activism limited to contexts where the majoritarian political process was likely to fail (Ely, 1980).

There was yet more fodder for Warren Court critics in a series of cases on the constitutionality of state voting districts. The Court had avoided the issue of apportionment in the past. Justice Felix Frankfurter argued in 1946 that it would be impossible for the Court to get involved in apportionment cases and still maintain its independence from the other branches. To cross this line would be to enter the “political thicket,” an area strictly forbidden to the judiciary (Powe, 2000). The Court nevertheless took up this question in *Baker v. Carr* (1962). In Tennessee, many residents had moved from rural to urban areas, but voting districts had not changed in sixty-one years. As a result, congressional districts were more populous in the cities. This diluted the strength of the votes of city dwellers and magnified political power in the less populous, and often more conservative, rural areas. Unequal voting power seemed unjust, but was it the Court’s job to redress this problem?

In *Baker*, the Court addressed the issue of the Court’s role in political controversies. Justice William Brennan’s majority opinion found that unfairness in state voting schemes was not a “political question” outside the bounds of judicial power. In later cases the Court established a constitutional standard of “one man, one vote”: each person’s vote must have equal weight. These cases resulted in an uproar of accusations that the Court had overstepped its bounds, had departed from the meaning and purpose of the Constitution, and had taken over a legislative function. However, this time the furor arose principally from scholars and politicians. The general public appeared to accept, and even welcome, the results of the cases (Cox, 1968; Bickel, 1986).

Scholarly reactions to *Baker* often set themselves within the terms of the countermajoritarian debate, a sign of Bickel’s influence. For example, Robert Bork argued that the reapportionment cases were a perfect example of the Court’s disregard for the Constitution, because the “one man, one vote” principle was “forced upon people who have chosen democratically to arrange their state governments in part upon a different principle” (Bork, 1990, pp. 84–5). In contrast, John Hart Ely believed that “unblocking stoppages in the democratic process is what judicial review ought preeminently to be about, and denial of the vote seems the quintessential stoppage” (Ely, 1980, p. 117; Horwitz, 1998).

Another critical area of social change was criminal justice. Beginning in 1961, the Court under Earl Warren transformed the rights of those accused of crimes. In *Mapp v. Ohio* (1961), the Court held that illegally obtained evidence could not be used in prosecutions in state courts. This extended the federal exclusionary rule to the states, and began the criminal procedure revolution of the 1960s. *Gideon v. Wainwright* came in 1963, holding that the Sixth Amendment guaranteed a right to counsel, and required states to provide indigent criminal defendants with a lawyer. According to Powe, this case was Warren’s only popular criminal procedure decision. *Miranda v. Arizona* in 1966 was one of the Warren Court’s most controversial decisions. The Court held that the Fifth Amendment right against self-incrimination required police
officers to notify a defendant of his or her rights before an interrogation in police custody. The “Miranda warning,” as it came to be called, informed defendants of their right to be silent and their right to an attorney. Although the *Miranda* case was heavily criticized, Miranda warnings became a standard aspect of police procedures. They became well known through popular television programs featuring fictional police stories, so that even children would incorporate Miranda warnings into their play. The criminal law revolution then came to a halt after *Miranda*, as the Court allowed police to “stop and frisk” suspects without showing probable cause in 1968 *Terry v. Ohio* (Horwitz, 1998; Powe, 2000). Some scholars would view these cases as another aspect of judicial usurpation and “government by judiciary” (Berger, 1977). For a later generation of scholars, however, the criminal justice cases were an important element of the Warren Court’s efforts to achieve racial justice (Klarman, 2000).

Reactions to these and other judicial innovations put the Supreme Court at the center of American politics in the 1960s. In the spring of 1964, Alabama Governor George Wallace, who had already lambasted the Court for its civil rights rulings, broadened his critique. According to Wallace, the Court was responsible for a rise in “crime in the streets,” for the “Supreme Court is fixing it so you can’t do anything about people who set cities on fire.” Moving beyond sectional concerns, Wallace helped to nationalize court bashing. The 1964 Republican presidential nominee, Barry Goldwater, picked up this theme, criticizing the Court for having abandoned the principle of judicial restraint (Carter, 1995, p. 313).

**Women’s Rights and “Privacy” Rights**

The focus on iconic figures and cases, while helping to give focus to the writing of constitutional history, can leave important issues outside of the master narrative. In legal studies, the move to “canonize” a set of texts has particular power. The legal canon becomes the limited set of cases chosen for placement in law school casebooks. The canon becomes the legal doctrine learned by new generations of legal scholars, and relied on by courts as precedent for the future. Sanford Levinson (2000) has argued that the canon should be expanded, particularly to take account of foundational constitutional issues that arose in the context of American imperial expansion at the beginning of the twentieth century. The existence of a legal canon nevertheless continues to structure the study of American constitutional law in a way that renders marginal some important topics, such as the rights of women.

The Constitution was amended to protect women’s right to vote in 1920. While Reva Seigel (1999) has argued that the suffrage amendment should be understood as having more transformative power for women’s rights, the Supreme Court relegated the suffrage amendment to the periphery of constitutional analysis. While the Fifteenth Amendment, barring discrimination on the basis of race in voting, became part of the constitutional underpinnings for a broader vision of equality for persons of color, the woman suffrage amendment remained the equivalent of constitutional marginalia. Faced with a case involving sex discrimination against female bartenders in 1948, for example, Justice Felix Frankfurter wrote for the Court that “beguiling” as the issue in the case may be, “it need not detain us long.” Against a lone dissent, the Court upheld sex distinctions as obviously legitimate.
Before the Court would develop a gender equality jurisprudence, the Court took important steps to protect reproductive rights. In the landmark case *Griswold v. Connecticut* (1965), the Court held that a state ban on the use of contraceptives that applied even to married couples violated the Constitution. Such laws intruded on intimate relationships and so violated a constitutional right to privacy. Since privacy rights are not mentioned in the text of the Constitution, the Court struggled to find a rationale for this outcome. Justice Douglas’s majority opinion found that there were “penumbras, formed by emanations” from those rights specified in the Bill of Rights that created “zones of privacy” protected by the Constitution. Put together, these constitutional essences made it clear that the Constitution would not tolerate state intrusions into marital privacy.

The Court’s struggle to find an acceptable theory in *Griswold* was tied in part to the Court’s own history. The most likely home for a right to privacy was in the substantive right to be treated lawfully by government, which was implicit in the right to “due process of law,” guaranteed by both the Fifth and the Fourteenth Amendments. But “substantive due process” had been a basis for judicial activism during the early twentieth-century *Lochner* era. The *Lochner* case, a symbol of wrong-headed judicial activism that had undermined progressive reform efforts, continued to have a hold on the Court’s jurisprudence. In order to distinguish its own creation of rights from that of the *Lochner* Court, the justices struggled to find another, though ultimately unsatisfactory, constitutional mooring. Only Justice John Marshall Harlan embraced substantive due process, in an opinion that took on the legacy of *Lochner* and distinguished the right to privacy from *Lochner*’s form of judicial activism. And ultimately it would be Harlan’s approach that a majority would adopt in later years (Garrow, 1994).

In the meantime, however, although the right in *Griswold* seemed of obvious importance, the Court’s awkward analysis made the right to privacy an easy target for scholarly critics. Sylvia Law (1984) has argued that the context of *Griswold* – before the Court developed its sex discrimination jurisprudence – helps us to see a missing element of *Griswold* and later reproductive rights cases: a discussion of the importance of reproductive freedom to women’s equality. Instead, the rights in the reproductive freedom cases are rights to privacy in one’s intimate relationships and in one’s relationship with medical professionals. As Ruth Bader Ginsburg (1985) argued before her appointment to the Supreme Court, a more robust understanding of women’s constitutional equality would have provided an alternative legal basis for women’s reproductive rights.

“Government by Judiciary” or a “Hollow Hope”?

The landmark cases of *Griswold, Miranda, Brown, Baker v. Carr*, and others during the Warren years have led scholars to look upon this period in the Court’s history as characterized by judicial activism in the service of individual rights. For some scholars, this record epitomizes the Court at its best (Fiss, 1991). For critics, it is an example of judicial overreaching. Among the Warren Court’s contemporaries, Raoul Berger argued that Court decisions striking down state and federal statutes resulted in “government by judiciary” (Berger, 1977). For Archibald Cox the Warren Court’s involvement was crucial because the other branches of government were not acting
on reapportionment, criminal procedure reforms, and racial inequality. Either the Court had to do something, or nothing would be done at all (Cox, 1968).

Notwithstanding all the clamor about the Court entering the arena of politics, did the Warren Court really accomplish social change? Scholars identified with the critical legal studies movement have long argued that the law is indeterminate, and as a result legal precedent is never a firm foundation. Rulings always involve choices that are at base political. Alan Freeman and others brought these insights to bear on the Court’s developing equality jurisprudence, arguing that these rulings held out a promise of reform while masking continuing inequalities (Freeman, 1978).

In The Hollow Hope (1991), political scientist Gerald Rosenberg crystallized this line of analysis. He argued that the courts are not a source of meaningful social change, and when litigants rely on courts, their energies are deflected from the political process, where real change can occur. According to Rosenberg, the Supreme Court is not “dynamic” and by itself cannot produce significant social change. To the contrary, the Court is “constrained” because: (1) as an institution, it is limited as to the scope of issues it can address (limited to the Constitution, for example); (2) it lacks sufficient independence from the other branches of government; and (3) it lacks the power to develop appropriate policies and implement decisions. Thus, the Court can only facilitate change when other specific social and/or political factors work to reinforce Court rulings and provide incentives for compliance. The result is a “fly-paper Court” that lures in movements for social reform, causing them to pour resources into an institution that, without actually serving their needs, provides only an illusion of change. Turning to Brown, Rosenberg notes that meaningful school desegregation did not occur until after the passage of the Civil Rights Act of 1964, which gave the executive branch enforcement authority in the area of school desegregation (Rosenberg, 1991). Taking a somewhat different emphasis, Michael Klarman argued that it was not Brown that achieved social change on civil rights. Instead, Brown led to massive resistance, and it was the national reaction against massive resistance that led to significant social change such as the Civil Rights Act (Klarman, 1994).

Some legal scholars and social scientists suggest that legal culture and the power of law are more complex than Rosenberg allows. Michael McCann, for example, criticizes Rosenberg’s “top-down, unmediated view of judicial power,” which results in a “narrow understanding of causality and impact.” According to McCann, it is “surely correct . . . that landmark decisions by themselves rarely change either citizens’ behavior or personal values in a dramatic and uniform fashion.” Rosenberg’s approach, however, “tends to discount the reciprocal, interactive, relational terms of law’s constitutive power.” For McCann, litigation can have an impact on social movements, for example, by generating support from middle-class contributors who would be unwilling to support more “disruptive” forms of grassroots activity. In this way, “legal tactics can produce as well as consume financial resources.” McCann emphasizes that “legal norms and institutions neither guarantee justice nor are they simply obstacles and diversions to the pursuit of a more just society.” Both of these characterizations are overly simplistic. In his view, “given the overwhelming systemic inequalities and scarcities in basic resources that oppress subordinate groups, even limited, contingent, uncertain resources such as our legal traditions offer should be appreciated” (McCann, 1994, pp. 290–4, 309; see also Schultz, 1998).
For other scholars, the answer has been to turn away from the courts but not from the Constitution itself. Richard Parker argues for a “populist” non-court-centered constitutional politics, and Mark Tushnet proposes that people should “take the Constitution away from the courts,” looking to the political branches to give meaning to individual rights (Parker, 1994; Tushnet, 2000).

“The Counter-Revolution that Wasn’t?”

Whether or not scholars believe that Warren-era decisions led to effective social change, rulings in the areas of reproductive rights, apportionment, racial equality, criminal justice, and other areas became a focus of electoral politics in the 1968 presidential election. Richard Nixon attacked the Court in his campaign. Borrowing George Wallace’s argument that the federal courts were responsible for increased “crime in the streets,” Nixon’s 1968 campaign focused on “law and order.” He attacked the Supreme Court and its liberal rulings protecting the rights of defendants as standing in the way of government crime-fighting efforts. As an antidote to the liberal bench, Nixon promised to appoint strict constructionists who would interpreting law and not law (T. White, 1969; Carter, 1995). Nixon’s first Supreme Court appointee was Warren Burger, who replaced the retiring Earl Warren. Burger’s ideology fit well with Nixon’s agenda. He had publicly attacked the Warren Court and the expansion of individual rights. According to David O’Brien, “Burger came to the Court with the agenda of reversing the ‘liberal jurisprudence’ of the Warren Court and restoring ‘law and order’” (O’Brien, 2000, p. 69).

Since judicial politics was on the national agenda when Burger was appointed to the Court, and since the change in the Chief Justice was so stark – from liberal activist to conservative strict-constructionist – it was widely expected that under Chief Justice Burger the Court would take a sharp turn to the right. That was, after all, what Richard Nixon had had in mind. However, the “Burger Court” continued many of the doctrinal strands begun under Warren’s tenure. In the protection of individual rights, the Court took some dramatic steps forward that went beyond even what the Court had accomplished during the Warren years, most notably in the area of abortion rights, in Roe v. Wade (1973). During the 1970s the Court also developed for the first time a gender equality jurisprudence. Yet so widely was a conservative turn expected that a book on the Court during Burger’s tenure was subtitled “The Counter-Revolution that Wasn’t” (Blasi, 1983).

Scholars writing about race and the Burger Court tend to compare it with the Warren years. The trend of desegregation begun in the Warren years continued into the cases and decisions of the Burger era, but with notable setbacks. Swann v. Charlotte-Mecklenburg County School District (1971), for example, upheld cross-town busing as an appropriate remedy for school segregation, and Keyes v. School District No. 1 made it clear that the principles in the desegregation cases would be applied in northern and western schools that had not been subject to segregation statutes but were nevertheless racially segregated (Schwartz, 1986; Douglas, 1995). Perhaps a more important decision was Washington v. Davis, in which the Court ruled that in order to gain relief from a discriminatory policy, plaintiffs must prove that it was motivated by a “discriminatory purpose.” According to Derrick Bell, since discriminatory motive is often impossible to prove, Davis “raised beyond reach the barriers
to relief in a range of cases in housing, criminal justices, and education” (Bell, 1998, p. 62). In an influential article, Charles Lawrence argued that the intent requirement was inconsistent with the basic psychology of race in America. In a culture in which racial ordering had played a dominant role, actions that resulted in discrimination would often be the product of unconscious racial motivation. Yet unconscious racism was now beyond the reach of the Constitution (Lawrence, 1987).

One of the most contentious issues on the Court during this period was the issue of affirmative action. A divided Court barred racial quotas, yet left room for some consideration of race in university admissions in Regents of the University of California v. Bakke (1978). As the Court’s affirmative action case-law developed, a rich debate among legal scholars explored the questions of whether the Fourteenth Amendment envisioned a “colorblind” society in which any consideration of race was suspect, or whether the basic purpose of the Fourteenth Amendment was to overcome the enforced subordination created by a system of slavery. Under an anti-subordination model, affirmative steps taken to overcome racial hierarchy would be in keeping with the basic purpose of equal protection. The discussion would go beyond constitutional history and abstract legal reasoning, as scholars associated with the critical race theory movement enriched the discussion of race and the law by relentlessly confronting legal subjectivity, bringing the concrete experience of race-based oppression to legal analysis. Patricia Williams and others challenged the notion that race neutrality should be the remedy for race bias. Williams argued that affirmative action was not a constitutional harm but “an act of social as well as professional responsibility” (Williams, 1991, p. 50).

The Court would ultimately come together on affirmative action. As staunch conservatives joined the Court, the center shifted, creating a majority firmly on the side of colorblindness in Adarand Constructors v. Pena (1995). As Justice Antonin Scalia put it in his concurrence, “To pursue the concept of racial entitlement – even for the most admirable and benign of purposes – is to reinforce and preserve for future mischief the way of thinking that produced race slavery, race privilege and race hatred. In the eyes of government, we are just one race here. It is American” (Brest et al., 2000, p. 949).

In Roe v. Wade, the Court drew upon the right to privacy developed in Griswold, and struck down a Texas statute that made abortion a crime. With access to abortion blocked, many desperate women had sought what were called “back-alley abortions” from unregulated providers who operated in secret, while others attempted self-abortion, often with disastrous results. For this reason, the bloody coathanger became a symbol of the abortion rights movement. For some religious groups, however, human life began at conception, and so an abortion resulted in the intentional taking of a human life. The meaning of abortion seemed to turn on the moral status of the fetus and the unanswerable question of when human life begins (Luker, 1984; Garrow, 1994). In Roe v. Wade the Court held that the constitutional right to privacy protected the right to terminate a pregnancy, but also allowed states to regulate abortion. Since the Court deemed the question of the beginnings of human life unanswerable, and since important rights were at stake for pregnant women, Justice Harry Blackmun’s majority opinion balanced these interests. The further a pregnancy had developed, the stronger the interests of the state, and the more likely they were to outweigh a woman’s right to choose to have an abortion, so that in the
third trimester, when the fetus would reach the point that it could survive outside the woman's womb, the state could prohibit abortion unless it was necessary to save a woman's life or safeguard her health.

*Roe v. Wade* set off a firestorm of criticism, and galvanized the “right to life” movement. Massive marches to the Supreme Court were organized on January 22, the anniversary of the day the decision was handed down. The combination of a high-profile case in a controversial area and a well-organized national right to life movement ensured that the Court would be at the center of political controversy for some time to come. Among scholars of the Court, the reaction to *Roe* initially mirrored reactions to *Brown*, with much criticism of the Court's constitutional analysis, although this time there was less consensus that the outcome was correct.

At the same time that the Court was expanding women's reproductive rights under a privacy rationale, the Court expanded women's right in another area: the right to equality. For most of the Court's history, gender equality was not given serious thought. As Linda Kerber (1999) has detailed, the Court relied on gender stereotyping and the idea that women's role was principally in the home when it upheld Florida rules that resulted in nearly all-male juries. It would not be until 1971 that the Court would strike down a statute for the first time on the grounds that it violated women’s constitutional right to equality. The Court’s about-face on sex discrimination happened in the context of a revived feminist movement and a renewed attempt to gain ratification of an Equal Rights Amendment (ERA) to the Constitution (Ginsburg, 1998; Seymour, 1998). In an argument reminiscent of Rosenberg, some scholars have suggested that when the Court decided its 1970s sex discrimination cases, it derailed political efforts to amend the Constitution (Mansbridge, 1986). Although the ERA was not ratified, by the end of the twentieth century the first two women justices on the US Supreme Court, Sandra Day O’Connor and Ruth Bader Ginsburg, ensured that the Court would continue to take sex discrimination claims seriously.

There were limits to the Court’s new privacy jurisprudence. Access to reproductive freedom had often been heavily affected by class standing, as women with resources were able to get around restrictions, while women needing publicly funded reproductive services were not. With abortion rights, the Court would codify that difference in a series of cases that refused to find any unconstitutional burden on the right to women’s freedom of choice posed by state and federal medical programs for the poor that banned use of government funds for abortion services. It was a woman’s poverty, the Court reasoned, not the government’s funding scheme, that made access to abortion difficult for poor women. Poverty was seen as a natural phenomenon that preceded the state and for which the government was not responsible. The result was that women had a right to choose, as long as they could pay for it (Dudziak, 1991).

The Court also declined to extend the right to privacy to gays and lesbians. In *Bowers v. Hardwick* (1986), the Court held that a Virginia anti-sodomy law was not unconstitutional, at least in the context of a prosecution of a gay man for homosexual sex, even though the consensual sex occurred in his own home. William Eskridge has argued that cases like *Bowers* both reinforced the “apartheid of the closet” but also helped galvanize the gay rights movement (Eskridge, 1999).
Judicial Politics at the End of the Century

President Ronald Reagan was particularly effective at using court appointments to further a political agenda. He instituted an anti-abortion “litmus test” for judicial appointees. Seeing the courts as a means to achieve a conservative social agenda over time, the Reagan administration sought steadfast conservatives who were also young, and therefore likely to have a long-lasting impact on the courts. President George H. W. Bush followed a similar strategy. By the end of the century, seven out of nine justices of the Supreme Court had been appointed by Republican presidents, so that the new conservative Chief Justice, William H. Rehnquist, had more allies in his efforts to roll back Warren Court-era reforms. The Reagan and Bush court appointments also had a profound effect on the lower federal courts as, by 1992, approximately 70 percent of lower court judges were Reagan and Bush appointees (Schwartz, 1988; Savage, 1992; O’Brien, 2000).

There was a limit to what could be accomplished by such an aggressively political strategy, however, as demonstrated by the defeat of Supreme Court nominee Robert Bork. Nominated in July 1987 to fill the vacancy created by the resignation of Justice Lewis F. Powell, Bork was immediately opposed by a broad coalition of civil rights groups appalled by his conservative views. In testimony before the Senate Judiciary Committee, Bork advocated judicial restraint and a theory of constitutional interpretation based on the constitutional text and the intentions of the framers. Bork believed that *Roe v. Wade* was not authorized by the framers’ intentions and also that the right to privacy in the use of birth control articulated in *Griswold v. Connecticut* was something the framers had not contemplated, and therefore something the Constitution did not protect. Bork’s widely televised testimony provoked a strong, negative public reaction. Some commentators likened the Bork hearings to a national teach-in on the Constitution, with a final public referendum in favor of a constitutional right to privacy. Bork was ultimately defeated by the widest margin of votes in the Senate in the history of the confirmation process (Schwartz, 1998).

Following Bork, the next nomination to generate especially widespread controversy was Bush’s nomination of Clarence Thomas in 1991 to fill a vacancy created by the retirement of Justice Thurgood Marshall. The selection of Thomas, a conservative black Court of Appeals judge who formerly served as chair of the Equal Employment Opportunity Commission, in part reflected a sense that it was important for a black person to fill the seat of the only black justice ever to serve on the Supreme Court. President Bush also rightly calculated that it would be more difficult for liberals to mount an effective challenge to a black appointee. Ultimately it would not be his conservative ideology that would be the greatest hurdle to the Thomas nomination. Rather, it was a charge of sexual harassment by Anita Hill, a former Thomas subordinate at the Equal Employment Opportunity Commission. Senate hearings were held to air the Hill allegations. Even though many praised Hill for raising the nation’s consciousness about sexual harassment, Thomas was ultimately confirmed. By the end of his first Supreme Court term, his harshly conservative opinions led the *New York Times* to call him “The Youngest, Cruelest Justice” (Savage, 1992).

By 1992, a staunchly conservative Court majority was thought to be ready to overturn *Roe v. Wade*. The threat to *Roe* helped galvanize supporters of abortion rights,
including members of Congress and presidential candidates. In *Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992), however, a new coalition of justices – Sandra Day O’Connor, Anthony Kennedy, and David Souter – voted with Court moderates to uphold most aspects of a Pennsylvania statute restricting access to abortion, but not to overturn flatly *Roe v. Wade*. While *Casey* vastly expanded the ability of states to regulate abortion and to encourage women not to have the procedure, *Roe* remained on the books as a precedent, albeit a substantially weakened one; as a result, *Casey* diffused abortion as a political issue among progressives (Garrow, 1994).

Because most commentators viewed *Casey* as an affirmation rather than an evisceration of *Roe*, the case seemed to fit a pattern, reinforcing the belief that a conservative counterrevolution on the Court had once again failed to materialize. In the last decade of the twentieth century, however, the Court appeared to move in a new direction. Increasingly vocal opponents of affirmative action saw the Court as protecting their vision of individual rights, and opponents to government regulation argued that the Court was protecting liberty. Since 1937 the Court had been deferential to the political branches in the area of economic legislation, but with *United States v. Lopez* in 1995, the Court began to develop a new federalism jurisprudence. In the name of states’ rights, the Court struck down congressional attempts to regulate firearms near schools, to criminalize violence against women, to protect persons with disabilities from discrimination by state governments, and other areas. The most marked change was the Court’s refusal to defer to choices made by Congress. Ironically, countermajoritarianism, once a conservative critique of a liberal court, had come to characterize a conservative judiciary. Legal scholars began the 1990s debating whether a conservative revolution had or had not happened. By the end of the century it was clear that the Court had carved out for itself an activist role – both to restrict the reach of congressional power and to protect a new vision of individual rights, the rights of supposed victims of state and federal affirmative action programs (Symposium, *Stanford Law Review*, 2001).

Critics of the Court continued to divide along political and ideological lines. One act would bring many Court critics together, however, at least for a moment. After an uncertain presidential electoral result in Florida in December 2000, the Court intervened. Notwithstanding an earlier judgment that the Court risked its legitimacy any time it entered the political arena, the Court first issued an order blocking a recount of disputed Florida ballots, and then blocked the State Supreme Court’s efforts to bring the election to a resolution with a recount by ruling that the state court’s efforts violated the US Constitution. Because the five members of the Court majority seemed to disregard their own views of federalism and equal protection in reaching this result, the Court’s creative constitutional analysis was quickly criticized, momentarily bringing legal scholars together across ideological lines. In the aftermath, some asked whether it had not finally become clear that politics was necessarily at the center of judicial action. The Court was seen as having damaged its legitimacy by raising the veil and exposing itself as a partisan actor (Gillman, 2001).

Yet just as it appeared that a wide range of legal scholars had joined the critical legal studies camp, the process of “renormalization” set in, according to Mark Tushnet (2001). Just as statisticians normalize data so that outliers do not disrupt the results, so too, he argued, were legal scholars finding ways of explaining *Bush v. Gore* that did not disrupt their fundamental need to believe in the rule of law. In the
showering of legal scholarship that followed the decision, Alan Dershowitz (2001) argued that the Court had committed a criminal act, while Judge Richard Posner (2001) argued that the Supreme Court had stepped in to protect the nation from an impending constitutional crisis. In a careful analysis, Howard Gillman (2001) argued that the Supreme Court had indeed acted in a partisan manner in the election case, but that the many other state and federal judges involved in the complex litigation had not been partisan. As a result the overall picture was more salient to the hope of judicial impartiality. Still the glaring reality that the Supreme Court had cast the vote that counted the most in the election case ensured that the century ended with a new, if troublesome, icon.

The five members of the Bush v. Gore majority did not seem to garner the same level of public opprobrium that the New Deal-era Court had. Yet they have made a mark on the image of the Court at least as clear as that of their predecessors during the “switch in time.” As Bush v. Gore settles uncomfortably into the legal canon, its lessons are sure to be constructed by scholars to inform new visions of the Court in generations to come.

REFERENCES

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FURTHER READING


